No. 21407

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, AND ITS LOCAL UNION NO. 769, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce an order (R. 125–126),[1] issued against the International Brotherhood of Electrical Workers, AFL–CIO (hereafter the IBEW) and its affiliated Local Union No. 769 (hereafter Local 769), on August 31, 1965 and reported at 154 NLRB 839. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat.

[1] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the unfair labor practices having occurred at the Glen Canyon Dam Construction site in northern Arizona, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondents violated Section 8(e) of the Act by entering into a contract with Ets-Hokin Corporation (hereafter Ets-Hokin) which provided for the termination of contractual relations by the contracting IBEW local and by all other IBEW locals if Ets-Hokin, a general contractor, subcontracted electrical work to an employer who did not recognize a local of the IBEW. The Board also found that respondents violated Section 8(b)(4)(ii)(A) and (B) by threatening to terminate all contractual relations between Ets-Hokin, the IBEW, and its affiliated locals unless Ets-Hokin ceased doing business with the Rose Construction Company, Phoenix Division (hereafter Rose-Phoenix), a non-IBEW subcontractor. The underlying facts are summarized below:

Ets-Hokin is a general and electrical contractor and does business in various states (R. 46; Tr. 31). At the time of the events in question, Ets-Hokin had contracts with IBEW locals throughout the country containing the following clause or one substantially similar to it (R. 118, 46–47, 68–72; G.C. Ex. 7, p. 9, Tr. 128–131):

> The Local Unions are a part of the International Brotherhood of Electrical Workers

> and any violation or annulment of working rules or agreements of any other local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this or any other such Local Union by the Employer, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

In October of 1962, Gerald McAllister, a superintendent for Ets-Hokin at a construction project in Glen Canyon, Arizona, entered into a contract with Rose-Phoenix whereby the latter was to construct steel transmission towers and other steel structures (R. 47; Tr. 87). Rose-Phoenix employees came on the project in January of 1963 and, shortly thereafter, executed a collective bargaining agreement with a local of the International Union of Operating Engineers recognizing it as the exclusive bargaining agent and sole source of personnel for the Glen Canyon project (R. 47; Tr. 282, Resp. IBEW Ex. 5).

Within a few days after Rose-Phoenix started on the job, McAllister received a phone call from Joe Housley, Business Representative of respondent Local 769. Housley informed McAllister that Ets-Hokin was in violation of its IBEW contract because there was a non-IBEW subcontractor on the job (R. 48; Tr. 89–92). McAllister told Housley to contact Ets-Hokin's San Francisco Office (Tr. 92). In a

letter dated February 1, 1963, Housley wrote to Ets-Hokin in San Francisco and, quoting a clause similar to that set out *supra,* pp. 2–3, reiterated that Ets-Hokin was in violation of its IBEW contract and that he, Housley, had asked the International to cancel that contract (R. 48; GC Exh. 8).[2]

On or about February 8, 1963, representatives of both Local 769 and IBEW met with McAllister and advised him that Rose-Phoenix did not have an IBEW contract, was not eligible for one, and therefore must be removed from the Glen Canyon project if Ets-Hokin was to avoid termination of its IBEW agreements (R. 49; Tr. 94–96). In a subsequent telephone call, Local 769 representative Housley reiterated to McAllister that Ets-Hokin would have to comply. McAllister replied that he needed time to straighten things out and Housley agreed to speak to IBEW representatives about giving Ets-Hokin 5 or 10 days to bring itself into compliance (R. 51; Tr. 97–98).

At the same time, other representatives of the respondents were placing similar pressure on the contractor's President, Jeremy Ets-Hokin. In January 1963, IBEW Vice-President Foehn told President Ets-Hokin that Ets-Hokin was "not in the best graces" of the IBEW President because of the Rose-Phoenix problem and that termination of its international agreement was an imminent possibility (R. 51; Tr.

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[2] At this time, Ets-Hokin had no contractual relations with Local 769. However, Housley referred to a contract between Ets-Hokin and Local 640, the predecessor of Local 769 in the Glen Canyon area (R. 47, 123, n. 14; Tr. 82, GC Ex. 8).

25–29). On February 26, 1963, IBEW President Freeman wrote Jeremy Ets-Hokin, again detailing the clause providing for termination of all IBEW contracts in the event of any subcontracting to non-IBEW subcontractors and informing him that he was said to be in violation of that clause (R. 48; GC Ex 4). In late March of 1963, Jeremy Ets-Hokin had a phone conversation with IBEW President Freeman. Referring to the Glen Canyon work being performed by Rose-Phoenix, Freeman stated that "it's our work" (Tr. 39), that Ets-Hokin had been given enough time to straighten matters out, and that he could have only 24 hours more to live up to his IBEW agreement or else the IBEW contracts would be terminated (R. 52; Tr. 35–39, 63). Freeman was persuaded to give Ets-Hokin one final week to bring himself into compliance (R. 52; Tr. 37).

Shortly thereafter, Jeremy Ets-Hokin informed Rose-Phoenix officials that he had no alternative but to terminate contractual relations with them because he was in jeopardy of losing his agreement with IBEW (R. 52; Tr. 50–52, 269–270).[3]

Subsequent to the termination of Rose-Phoenix, Ets-Hokin performed the previously subcontracted work itself using employees hired through the Local 769 hiring hall (R. 53; Tr. 59). Ets-Hokin also entered into a contract with Local 769 which contained the typical clause quoted *supra,* pp. 2–3, proscribing

[3] Ets-Hokin and Rose-Phoenix entered into a settlement which terminated their contractual relationship. Rose-Phoenix received $50,000 as consideration for entering into this settlement as well as a "generous" price for the equipment which Ets-Hokin purchased from it (R. 52; Tr. 273, Ets-Hokin Ex 1–B).

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subcontracting to a non-IBEW subcontractor and providing for termination in the event of the breach of that proscription (R. 53; GC Ex 6, GC Ex 7, p. 9).

II. The Board's conclusions and order

Upon the foregoing facts, the Board found that so much of the IBEW contract as precluded Ets-Hokin from subcontracting to non-IBEW contractors violated the general proscription of Section 8(e) but was saved from illegality because of the construction industry proviso to that Section.[4] The Board, however, found violative of Section 8(e) those portions of the clause which purported to give IBEW and its locals the right cancel this and all other IBEW contracts with Ets-Hokin in the event of a breach of the subcontracting restriction. The Board viewed the termination provisions as a form of self-help which coerced adherence to the subcontracting provision. As such, the Board ruled, the termination provisions were not protected by the proviso since it was Congress' intent that secondary contractual restrictions, illegal under

[4] The provision reads, in relevant part:

"* * * provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *."

The Trial Examiner had found that the restriction in the contract on subcontracting to non-IBEW companies was not saved by this proviso because the clause was not, in terms, limited to on-site construction work (R. 54–56). The Board ruled that such limitation need not appear on the face of the contract, but that where, as here, the evidence showed that application was intended to be limited to on-site work, the clause was within the proviso (R. 119–120).

Section 8(e) but for the proviso, were to be enforced only through judicial action and not by conduct proscribed by Section 8(b)(4)(B) (R. 120–122, 133–134). The Board further found that respondents violated Section 8(b)(4)(ii)(A) by threatening Ets-Hokin with termination of its IBEW agreements with the object of forcing Ets-Hokin to enter into an agreement prohibited by Section 8(e) of the Act (R. 123). Finally, the Board found that by threatening to cancel its contracts with Ets-Hokin, respondents violated Section 8(b)(4)(ii)(B) since the object of that coercion was to cause Ets-Hokin to cease doing business with Rose-Phoenix (R. 123–124).[5] Accordingly, the Board ordered respondents to cease and desist from entering into, maintaining, or enforcing the termination and sympathetic action portions of the subcontracting clause in their collective bargaining agreements. Furthermore, the Board ordered respondents to cease and desist from threatening, coercing or restraining Ets-Hokin or any other person to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any

[5] The Board reversed the Trial Examiner's finding that Ets-Hokin also violated Section 8(e) in view of the fact that neither the charge nor the complaint alleged a violation of that section by Ets-Hokin (R. 122, 3–4, 9, 14, 16–23).

Furthermore, the Board reversed the Trial Examiner's finding that both the respondent unions and Ets-Hokin were guilty of violating Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) respectively by causing the termination of Rose-Phoenix's employees. The Board ruled that the lawful subcontracting clause was severable from the unlawful termination clause and that the unions had the right to insist, although not by proscribed means, that Ets-Hokin terminate its contract with Rose-Phoenix, which was a non-IBEW contractor. Accord-

other person. Finally, respondents were directed to post appropriate notices (R. 125–126).[6]

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(b)(4)(ii)(B) of the Act by coercing Ets-Hokin with an object of forcing or requiring it to cease doing business with Rose-Phoenix

Section 8(b)(4)(B) of the Act provides, in relevant part, that it is an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

A Section 8(b)(4)(ii)(B) violation therefore requires two elements: (1) a labor organization or its

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ingly, in terminating Rose-Phoenix's employees in accordance with the lawful restrictive subcontracting clause, Ets-Hokin did not violate Section 8(a)(1) and (3) of the Act; and, in insisting that Ets-Hokin adhere to this lawful contract provision, the respondent unions did not cause Ets-Hokin to unlawfully discriminate in violation of Section 8(b)(2) and (1)(A) (R. 125).

The Board's action in dismissing portions of the complaint is not challenged in this proceeding.

[6] Member Fanning concurred in so much of the Board's Decision and Order as dismissed the alleged violations of Section 8(a)(3) and Section 8(b)(2). He dissented as to the remaining portion and would have dismissed the complaint in its entirety (R. 127–131).

agents must "threaten, coerce or restrain" an employer; and (2) an object of its conduct must be the cessation of business between two employers.

In the instant case, there can be little question concerning the latter element. As detailed, *supra,* pp. 3–5, representatives of both respondents made no secret of the fact that their displeasure with Ets-Hokin stemmed from its subcontracting arrangement with Rose-Phoenix. Ets-Hokin was said to be in violation of its IBEW contracts solely because it was doing business with Rose-Phoenix, a contractor who was characterized as being non-IBEW and ineligible to become an IBEW contractor. It was obvious to all concerned that only the cessation of business between Ets-Hokin and Rose-Phoenix would satisfy respondents.[7]

Nor can there be any doubt that respondents' threat to cancel all IBEW contracts with Ets-Hokin constitutes "coercion" within the meaning of the Act.

[7] Before the Board, respondents contended that the reason they threatened to terminate the IBEW contracts was because Ets-Hokin had breached an implied condition of these contracts by subcontracting to Rose-Phoenix, whose wage scale was allegedly below the rates set up pursuant to the Davis-Bacon Act. However, there is substantial evidence to support the Board's finding (R. 122–123) that this was not the sole, nor even the main reason for respondents' threat. Respondents insisted that only the removal of Rose-Phoenix could satisfactorily resolve the dispute (R. 123; Tr. 46, 95–96, 102–203). It is not necessary to find that respondents' sole object was unlawful. Rather, it is sufficient if substantial evidence supports the finding that one of the objects was unlawful *N.L.R.B.* v. *Amalgamated Lithographers*, 309 F. 2d 31, 43–44 (CA 9); *Dep't & Specialty Store Employees' Union* v. *Brown*, 284 Fed 619, 628 (CA 9).

The prohibition of the secondary boycott provisions of the Act extends beyond force, violence and picketing as a means of bringing pressure against the neutral secondary employer. Thus, Representative Griffin, in analyzing the new Section 8(b)(4)(ii)(B) stated that it would be illegal for a union to threaten a secondary employer "with labor trouble or other consequences" in order to induce him to cease doing business with the primary employer. II Leg. Hist. 1568.[8] Elsewhere he referred to the means prohibited as including threatening the secondary employer *"with a strike or other economic retaliation"*. II Leg. Hist. 1523, emphasis supplied. See also, *N.L.R.B.* v. *Local 825, Operating Engineers,* 315 F. 2d 695, 697–698 (C.A. 3); *N.L.R.B.* v. *Highway Truckdrivers & Helpers, Local No. 107,* 300 F. 2d 317, 320–321 (C.A. 3). As the Supreme Court has noted, "the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise". *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760, et al.* (*Tree Fruits*), 377 U.S. 58, 68.

The coercive nature of respondents' conduct is clear. The real meaning of the repeated threats to terminate IBEW contracts was spelled out by IBEW in its brief to the Board:

> Because the so-called annulment clause contained in the IBEW's contract with Ets-Hokin

[8] "Leg. Hist." refers to Legislative History of the Labor-Management Relations Reporting and Disclosure Act of 1959 (G.P.O., 1959).

> was repeated in the union's agreements with other contractors, cancellation of the Ets-Hokin agreement would have immediately made that company an ineligible business associate in the eyes of these other contractors. Thus, whether or not the union continued to refer workmen to Ets-Hokin, the mere fact that the latter had no agreement with the IBEW would have placed Ets-Hokin in a position where other contractors wishing to comply with their own IBEW agreements would not have made contracts with Ets-Hokin. Under such circumstances, there was no motivation for the union to take the strike action the General Counsel considers inevitable.

In short, the effect of termination of the IBEW agreements was likely to be the economic extinction of Ets-Hokin. Termination would have made Ets-Hokin a pariah in the construction industry—an "ineligible business associate" to be avoided by other contractors anxious to remain free of the contamination of labor trouble. Thus, Ets-Hokin was threatened by economic action potentially more devastating than either a strike or a refusal to refer employees under a hiring hall arrangement. Since a threat to take either of these latter steps is "coercive" within the meaning of Section 8(b)(4)(ii) (e.g., *N.L.R.B.* v. *Dist. Council of Painters No. 48,* 340 F. 2d 107, 110–111 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B.* v. *Local 825, Operating Engineers, supra,* 315 F. 2d at 697–698), it follows that the threat to terminate Ets-

Hokin's IBEW contracts is also a prohibited means of attaining a secondary goal.[9]

Before the Board, respondents relied upon *Sheet Metal Workers* v. *Hardy Corp.*, 332 F. 2d 682 (C.A.

[9] Local 769 contended before the Board that it should not be held to have violated Section 8(b)(4) even if threats to terminate are "coercive." It argued that under the IBEW constitution, a local does not have power to terminate a contract but only to recommend such action to the International and, therefore, it cannot be held to have coerced Ets-Hokin because Ets-Hokin knew of this limitation on Local 769's power. However, it is undeniable that Local 769 combined with respondent IBEW in a joint effort to remove Rose-Phoenix from the construction project. It was the business representative of Local 769 who made the protest that first brought IBEW into the case and Local 769's representatives participated in the various meetings between IBEW and Ets-Hokin described *supra* pp. 3–5. Moreover, the beneficiary of Rose-Phoenix's removal was Local 769, since subsequent to the removal Ets-Hokin entered into a contract with it and thereafter the workers who performed the construction work which would have been done by Rose-Phoenix's employees were referred by Local 769 through its hiring hall (*supra*, p. 5). Finally, this and other local contracts contain the usual recitation that the particular local "is a part of the International" and a breach of one local's contract warrants termination of all IBEW contracts (G.C. Ex. 7, p. 9). Thus substantial evidence supports the Board's finding (R. 124, 53–54) that respondents shared a common objective of obtaining work for IBEW members who belonged to Local 769, and that they worked in concert to obtain this goal. It is well settled that the general rules of agency law apply in cases arising under the Act. *N.L.R.B.* v. *Int'l Longshoremen's & Warehousemen's Union, Local 10*, 283 F. 2d 558, 563 (C.A. 9) and authorities there cited. And, the Supreme Court has held that joint venturers are the agents of each other and thereby responsible for the other's conduct. *Hitchman Coal & Coke* v. *Mitchell*, 245 U.S. 229, 249. Accord: *Int'l Org. of Masters, Mates & Pilots* v. *N.L.R.B.*, 351 F. 2d 771, 777–778 (C.A.D.C.). See also *Int'l Longshoremen's & Warehousemen's, etc.* v. *Juneau Spruce Corp.*, 189 F. 2d 177, 190 (C.A. 9),

5), in support of their contention that the threat to terminate was not coercive within the meaning of Section 8(b)(4). We submit, however, that the *Hardy* case supports the Board's position rather than respondents'. In that case the union brought an action under Section 301 of the Act for damages, enforcement of an arbitration award against the Company and a declaration of rights for breach of a contract prohibiting subcontracting of work to be performed on the construction site to a non-union contractor. The District Court dismissed on the grounds that the bringing of the lawsuit constituted coercion within the meaning of Section 8(b)(4). On appeal, the Fifth Circuit reversed. The Court noted that Congress had expressly preserved the validity of the contract clause involved and that it would be inconsistent to rule that judicial enforcement of it was barred since that would render the clause of "little or no value." 332 F. 2d at 686. However, the Court was careful to limit its ruling to judicial enforcement of the contract (332 F. 2d at 686):

> We believe Congress used "coerce" in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike,

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aff'd 342 U.S. 237; *N.L.R.B.* v. *Local 751, Carpenters*, 285 F. 2d 633, 639–640 (C.A. 9). Consequently Local 769 is jointly responsible for the unlawful coercion prohibited by the Act. Local 769's representatives sought IBEW's intervention and fully participated in all that followed. It is irrelevant that the common objective could not be achieved without IBEW's assistance.

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> picketing, or other economic retaliation or pressure in a background of a labor dispute.

Termination of Ets-Hokin's contracts would have been retaliatory self-help rather than judicial action. Accordingly, the threat to terminate, unlike a threat to bring suit, is coercive under the definition set forth in *Hardy*.[10]

Respondents further contended that the threat to terminate was no more than an announcement of their intention to invoke an alternate form of contract remedy—unilateral rescission for material breach. In evaluating this contention it should be borne in mind that respondents threatened to terminate *all* contracts with Ets-Hokin, not only the contract with Local 769's predecessor. Even if the remedy of unilateral rescission were fully applicable to labor contracts,[11] it would hardly be resorted to in support of a unilateral rescission of *all* contracts with Ets-Hokin. Most important, it is apparent that more is involved

[10] Since respondents have the right to bring suit against Ets-Hokin, there is no substance to the contention urged before the Board that the subcontracting clause has little value if respondents cannot enforce it in the manner which they employed here. The courts may grant damages, specific performance, declaration of rights and other appropriate relief to insure that the clause retains the value which Congress meant to preserve for it.

[11] In other contexts, the Supreme Court has ruled that the traditional contract remedy of unilateral rescission must give way where it comes in conflict with national labor policy. Thus, the Court has ruled that a union's breach of a no-strike clause does not automatically entitle the employer to disregard his contractual obligation to arbitrate. *Local Union No. 721, United Packinghouse, Food & Allied Workers AFL–CIO* v. *Needham Packing Co.*, 376 U.S. 247.

than the law of private contracts. As developed more fully, *infra,* pp. 21–30, the enactment of the construction industry proviso to Section 8(e) was not intended to affect the application of Section 8(b)(4). It was Congress' intent that a contract saved from illegality by that proviso could not be enforced by means prohibited under Section 8(b)(4). Coercive measures undertaken by a union are not saved from illegality because that they are undertaken to enforce a contract clause lawful under the proviso. *Local 1976, Carpenters* v. *N.L.R.B.* (*Sand Door*), 357 U.S. 93, 104–107; *N.L.R.B.* v. *Int'l Union of Operating Engineers,* 293 F. 2d 319, 323 (C.A. 9); *N.L.R.B.* v. *Int'l Bro. of Electrical Workers, Local 683,* 359 F. 2d 385, 386 (C.A. 6); *Local 5, United Ass'n etc.* v. *N.L.R.B.,* 321 F. 2d 366, 369–370 (C.A. D.C.), cert. denied, 375 U.S. 921; *Orange Belt District Council* v. *N.L.R.B.,* 328 F. 2d 534, 537 (C.A. D.C.), enforced subsequent to Board decision on remand, 365 F. 2d 540; *N.L.R.B.* v. *Local 217, United Ass'n etc.,* 361 F. 2d 160, 162 (C.A. 1).[12] Thus, irrespective of whether the construction industry proviso saves all or only a part of the subcontracting-termination clause from illegality under Section 8(e), respondents' threat, in the concrete situation, to invoke the severe economic sanction

[12] "We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit. We also realize the difficulty the building crafts have with the secondary boycott provision of the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute." *Local 5, supra,* 321 F. 2d at 370.

of termination unless Ets-Hokin ceased doing business with Rose-Phoenix violated Section 8(b)(4)(ii)(B). "The proviso does not legalize strikes or other coercive action to enforce such clauses." *N.L.R.B.* v. *Int'l Union of Operating Engineers,* 293 F. 2d 319, 323 (C.A. 9).

II. The Board properly found that respondents violated Section 8(e) of the Act by entering into a contract which provided for the termination of contractual relations by the contracting IBEW local and by all other IBEW locals in the event Ets-Hokin subcontracted to a non-IBEW contractor

A. Introduction: The general proscription of Section 8(e) and its legislative history

The declared purpose of the secondary boycott provisions of the 1947 Taft-Hartley Act was to limit the area of industrial dispute, in order to confine its effects to the parties immediately concerned, and to prevent its extension to employers and employees not directly involved.[13] As the Supreme Court pointed out, these provisions were aimed at "shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692. However, in the interval between the passage of the Taft-Hartley Act and the 1959 amendments, labor organizations resorted to tactics to circumvent the secondary boycott proscriptions by successfully exacting from employers so-called "hot cargo" agree-

[13] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 22, 54; 1 Leg. Hist. of Labor-Management Relations Act, 1947 (G.P.O., 1948), pp. 414, 428, 460 (hereafter referred to as "Leg. Hist. '47"); 2 Leg. Hist. '47, 1106.

ments under which the employers relinquished their freedom to handle or provide goods and services for or to employers which the contracting union considered "unfair."[14] The Supreme Court in *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.* (*Sand Door*), 357 U.S. 93, held that such agreements were not illegal, pointing out that under the then-existing secondary boycott provisions contained in Section 8(b)(4), the legal prohibition was directed not at any contractual *agreement* entered into on the part of the employer, but only at union *inducement* of employees to refuse to handle goods.[15]

Cognizant of this "major weakness in the law against secondary boycotts" (II Leg. Hist. 1708), Congress in the 1959 amendments undertook to close the "loopholes" which permitted labor organizations to circumvent these boycott provisions. Thus, Section 8(e), added by the Landrum-Griffin Act, made unlawful "any contract or agreement, express or implied" whereby an employer agrees not to handle products of another employer or agrees to cease doing business

[14] See, e.g., the analysis of the secondary boycott and "hot cargo" provisions in the 1959 amendments by Senator Kennedy and Congressman Thompson, II Leg. Hist. 1707–1709.

[15] Although the Supreme Court held that the execution of hot cargo agreements and voluntary compliance therewith by the employer were lawful, it also held that the inducement of employees to strike or refuse to handle "hot goods" with the object of forcing employers to abide by the hot cargo agreements, was unlawful. Such hot cargo agreements, the Court held, did not constitute a defense to the secondary boycott provisions. *Local 1976*, *supra*.

with any other person.[16] In addition, Congress amended Section 8(b)(4) to make coercion to achieve such an agreement an unfair labor practice.

The legislative history of the 1959 amendments demonstrates that Congress, in acting to eliminate conduct it regarded as offensive, adopted a broad and comprehensive ban against "hot cargo" agreements.[17] Throughout the course of Congressional deliberations,

[16] The statutory language is:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided, further, That for the purposes of this subsection (e) and Section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce" and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided, further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

[17] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118 (1960): "The new law expresses the decision of Congress that 'hot cargo' agreements are basically wrong and should be forbidden entirely."

a myriad of concrete examples were presented in both Houses of Congress illustrating the concern over the ineffectiveness of then-existing law to deal with hot cargo clauses and other circumventions of the secondary boycott provisions of the Act.[18] The bill passed by the Senate outlawed hot cargo commitments only in the trucking industry, where they had been most prevalent and most effective (S. 1555, 86th Cong., 1st Sess. Sec. 707(a)). The House bill, however, expanded the prohibition to include all hot cargo commitments in all industries (H.R. 8400, 86th Cong., 1st Sess., Sec. 705(b)). The provision which emerged from the joint conference adopted the language of the House bill, but the conferees were persuaded to grant exemptions for the construction and apparel industries (I Leg. Hist. 943).

Section 8(e)'s origin makes it plain that Congress intended the established law of secondary boycotts to serve as a guide in the application of this new provision. Indeed, many legislators referred to the Section 8(e) agreement as a "form of secondary boycott," or a "contract to enter into a secondary boycott," or a "loophole in Section 8(b)(4)."[19] Consistent with this legislative intention, the Board and the courts have uniformly found Section 8(e) violations wherever contractual devices have been used

[18] See, e.g., II Leg. Hist. 1193–1194, 1196–1197, 1754, 1518–1519, 1568, 1580–1581, 1589, 1616, 1618.

[19] See S. Rep. No. 187 on S. 1555, I Leg. Hist. 474, 475; H. Rep. No. 741 on H.R. 8342, I Leg. Hist. 778, 779; II Leg. Hist. 1007(3); *Ibid.*, at 1194(3), 1197(2); 1326(1), 1437(3), 1441(2), 1499(2), 1535(3), 1555(2), 1568(2),(3), 1575(3), 1616(2), 1708(1), 1750(1), 1829(2).

to achieve a *secondary* object, that is, where an employer and a union agree to boycott another employer in order to pressure that *other* employer into granting union demands.[20]

Respondents do not—indeed cannot—contest the Board's finding that the contract clause in question, prohibiting subcontracting to a "non-IBEW" contractor and providing for termination of this and all other IBEW contracts in the event the subcontracting restriction is breached, has such a secondary object. The entire clause falls within the general proscription of Section 8(e) and is illegal unless exempted from that general proscription by the construction industry proviso.[21] We turn next to a consideration of the application of the proviso to the contract clause in question.

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[20] *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9); *N.L.R.B.* v. *Milk Wagon Drivers' Union Local 753*, 335 F. 2d 326, 328–29 (C.A. 7); *Truck Drivers Local 413* v. *N.L.R.B.*, 334 F. 2d 539, 547 (C.A. D.C.), cert. denied 379 U.S. 916; *Bakery Wagon Drivers & Salesmen, Local 484* v. *N.L.R.B.*, 321 F. 2d 353, 358 (C.A. D.C.); *Los Angeles Mailers Union No. 9* v. *N.L.R.B.*, 311 F. 2d 121 (C.A. D.C.); *Employing Lithographers of Greater Miami* v. *N.L.R.B.*, 301 F. 2d 20, 30 (C.A. 5).

[21] The Board's finding that respondents violated Section 8(b)(4)(A) also turns on the application of the proviso. That section prohibits coercing an employer with an object of forcing him "to enter into any agreement which is prohibited by section 8(e)." Accordingly, respondent's attempt to force Ets-Hokin to reaffirm the termination clause violates Section 8(b)(4)(A) unless that clause is saved by the proviso. See *Construction, Production & Maintenance Laborers Union, Local 383, etc.* v. *N.L.R.B.*, 323 F. 2d 422 (C.A. 9); *Centlivre Village Apts.*, 148 NLRB 854, 855, 856, enforcement denied on other grounds, 352 F. 2d 696 (C.A.D.C.).

B. The construction industry proviso to Section 8(e) does not privilege the termination clauses

Section 8(e), as we have shown, constitutes a broad and comprehensive ban against "hot cargo" agreements. Congress, however, added a special proviso for the construction industry intended to permit unions in that industry to enter into hot cargo clauses which contemplate enforcement through the judicial process.[22] Accordingly, the Board held in the case at bar that the restriction on subcontracting to non-IBEW contractors was, in itself, within the proviso. However, a clause which sanctions coercive self-help in the event of an employer breach flouts the carefully balanced Congressional scheme. As the Court of Appeals for the District of Columbia Circuit has stated, "* * * such secondary clauses may be enforced only through lawsuits and not through economic action." *Orange Belt, supra,* 328 F. 2d at 537. See also, *N.L.R.B.* v. *Int'l Brd. of Electrical Workers, Local 683,* 359 F. 2d 385, 386 (C.A. 6); *Local 5, United Ass'n etc.* v. *N.L.R.B.,* 321 F. 2d 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921. For this reason, as we shall now show, the termination clause involved herein lies outside the protection of the construction industry proviso.

The starting place for analysis is the language of the Act itself. As the text of Section 8(e) shows

[22] The full text of the proviso is as follows:

"*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *."

(*supra,* p. 18, n. 16), Congress fashioned the two industry provisos in terms which differ markedly. Most notably, the garment industry proviso contains an exemption from the terms of Section 8(b)(4) as well as Section 8(e); the construction industry proviso, however, does not refer to Section 8(b)(4). As a result, (1) economic action to secure *and* to enforce a hot cargo clause is permissible in the garment industry; (2) picketing to secure such an agreement in the construction industry is permitted but—under Section 8(b)(4)(B)—economic action to enforce it is prohibited; and (3) in all other industries picketing either to secure or to enforce a hot cargo clause is proscribed. *Construction, Production & Maintenance Laborers Union, Local 383, etc.* v. *N.L.R.B.,* 323 F. 2d 422, 425 (C.A. 9); *Orange Belt, supra,* 328 F. 2d at 53.

The omission of a reference to Section 8(b)(4) in the construction industry proviso was deliberate, reflecting a considered legislative judgment to ban secondary economic pressure in this industry, even though the proviso's enactment would privilege some secondary *agreements* to cease doing business. As Senator Kennedy explained during the debates on the bill:

> This proviso affects only Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and *Moore Drydock* (92 NLRB 547) cases would remain in force.
>
> * * * Since the proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will con-

> tinue to be illegal under Section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.
>
> It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. II Leg. Hist. 1433.[23]

The conferees agreed:

> The proviso applies only to Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Dry Dock* cases would remain in full force and effect. The proviso is not intended to limit, change or modify the present state of the law with respect to picketing at the site of a construction project * * *. It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract. (H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., pp. 39–40; I Leg Hist. 943–944).

In sum, prior to the enactment of Section 8(e), it was not unlawful for a general contractor in the construction industry to agree with a labor organization to engage only union subcontractors on the job. If

[23] *Denver Building* held that a union is not entitled to picket a construction industry employer merely because he is in the relationship of contractor-subcontractor with the primary employer. In *Moore Drydock*, the Board listed certain objective criteria to aid in determining whether picketing at a common jobsite is aimed at the primary employer or at a neutral. *Sand Door*, as explained at p. 17, n. 15 above, held that a hot cargo clause is not a defense under Section 8(b)(4) when a union strikes for a secondary object.

the general contractor broke the agreement and engaged a nonunion subcontractor, the union could seek enforcement of the contract in the courts. However, it could not attempt to enforce the agreement by inducing the employees of the general contractor or of the union subcontractors to go out on strike; for then, its conduct would run afoul of Section 8(b)(4)(A) (now 8(b)(4)(i)(B)), which made it an unfair labor practice to induce employees to strike for a secondary object. See *Local 1976, United Brotherhood of Carpenters (Sand Door)*, 357 U.S. 93; *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675.

At the same time that Congress made it clear that the proviso was not meant to modify the law developed under Section 8(b)(4), Congress also moved to close what it considered to be a significant "loophole" in Section 8(b)(4). Although Section 8(b)(4)(A) of the Taft-Hartley Act prohibited a union or its agents from inducing employees to strike for a secondary object, direct coercion by the union of the neutral employer—i.e., threatening him with a strike or other economic sanctions unless he ceased doing business with the primary employer—was not prohibited. The new Section 8(b)(4)(ii)(B) prohibited such conduct. See *N.L.R.B.* v. *Servette,* 377 U.S. 46, 53–54, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv L. Rev. 1086, 1113 (1960); II Leg Hist 993–994, 1014, 1079, 1197, 1454.[24]

[24] Other "loopholes" in Taft-Hartley Section 8(b)(4)(A) were also closed by Congress. Since that section prohibited the inducement of "concerted" refusals to work, a union could, without violating the law, induce a single employee to stop

One of the most important reasons for closing this "loophole" was felt to be the need to prevent unions from enforcing "hot cargo" clauses by direct coercion of the employer. Senator Goldwater explained the necessity for amending Section 8(b)(4) as follows (II Leg Hist 1079):

> The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or cease doing business with, another person. If this objective is contrary to public policy, which it is, it is no less contrary to public policy to achieve it through one means rather than another.
>
> Threats of a strike or picketing made directly to an employer can be as effective as the strike or picketing itself. In this way an employer may be coerced into . . . living up to hot cargo agreements. . . . Under the law a union may not enforce such an agreement by inducing the employees to refuse to perform services. The agreement can be just as effectively enforced, however, by coercion of the employer, which is permitted under the present law.

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working. Also a union could induce anyone who did not come within the Act's definition of "employee" or who worked for an organization excluded from the definition of "employer". See *Servette, supra*, 377 U.S. at 51–53; *Aaron, supra*, at 1113–4 and the legislative history cited in the text. Senator Curtis expressed the sentiment which ultimately prevailed in Congress (II Leg. Hist. 989):

"* * * loopholes which permit unions to instigate effective secondary boycotts should be closed, and the effect of this bill will be to close them."

In specifying that the construction industry proviso to Section 8(e), unlike the garment industry proviso thereto, would not limit the application of Section 8(b)(4), Congress clearly intended that the objective of preventing direct coercion of employers, proscribed by subpart (ii) of Section 8(b)(4), would have full play in the construction industry even though proviso-saved "hot cargo" agreements were to be permitted. Thus, although "hot cargo" agreements are lawful in the construction industry, the evil referred to by Senator Goldwater—i.e., enforcement of such agreements by direct coercion of the employer—is still illegal. The proviso "does not legalize an agreement which purports to authorize conduct in violation of Section 8(b)(4)(B)." *N.L.R.B.* v. *Local 217, United Ass'n of Journeymen & App.* (*The Carvel Co.*) 361 F. 2d 160, 162 (C.A. 1).[25]

Carvel, supra, involved a construction industry contract which provided that no employee would be required to work on any job or project on which someone was performing at non-union standards, any work

[25] In addition to the evidence of Congressional intent shown by the legislative history cited above, Senator Goldwater, in a memorandum submitted to the Senate on the day the Landrum-Griffin Act was signed into law, stated:

"Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it" (II Leg. Hist. 1858).

within the jurisdiction of the contracting union. The Court agreed with the Board that the union's strike to enforce this contract when the employer breached it violated Section 8(b)(4)(B). *Id.,* at 162. Turning to the Board's finding that the clause itself violated Section 8(e), the Court accepted the principle urged here, that the proviso did not legalize a clause which sanctions Section 8(b)(4)(B) conduct. The Court, however, ruled that this legal principle was inapposite to the clause before it. Since the clause could be applicable to voluntary employee work stoppages independent of union inducement, the Court reasoned, the contract did not on its face seek to protect conduct proscribed by Section 8(b)(4)(B). *Id.* at 162–164. Only a union-induced work stoppage is within Section 8(b)(4). Accordingly, the Court held that the contract clause before it did not violate Section 8(e).

The termination clause in the case at bar, however, clearly contemplates union action. Employees cannot independently terminate a collective bargaining agreement—union action is necessarily called for. Even under the First Circuit's construction of Section 8(e), therefore, the contract clause involved here is not within the proviso because it does purport to sanction conduct prohibited by Section 8(b)(4)(B). "[T]he proviso was intended to dovetail with Section 8(b)(4), and neither to limit nor extend it" (361 F. 2d at 163). See also, *Sheet Metal Workers* v. *Hardy Corp.,* 332 F. 2d 682 (C.A. 5); *Orange Belt District Council* v. *N.L.R.B.,* 328 F. 2d 534, 537 (C.A.D.C.); *N.L.R.B.*

v. *Int'l Bro. of Electrical Workers, Local 683,* 359 F. 2d 385, 386 (C.A. 6).[26]

In sum, Congress, in enacting a limited exemption from the ban of Section 8(e) for the construction industry, intended to sanction the kind of hot cargo agreement where an employer simply agrees not to do business with a non-union employer. We submit that Congress did not intend to sanction a contract which permits economic action by the union to enforce the agreement. As shown, Congress' dominant objective in enacting the construction industry proviso was to permit contractors and unions to enter into agreement to make the job "all union", but at the same time, to free the contractors of direct economic pressure—or the threat thereof—to enforce such agreements. An agreement whereby the contractor simply

[26] In *Carvel*, 152 NLRB 1672, 1677, the Board cited its prior ruling in *Muskegon Bricklayers Union No. 5*, 152 NLRB 360, 365–366:

> "We can see no difference in practical effect . . . between a situation where a union induces employees to strike after an employer [breaches an exempted hot cargo clause] . . . and a situation where, in order to prevent such a breach, the union tells the employees that if the employer should violate the 'hot cargo' clause in the future, the employees may cease work with impunity."

Thus, the Board's position in *Carvel* was that clauses sanctioning self-help enforcement measures were not legalized by the proviso, where the effect of such measures would be *substantially similar* to the effect achieved by Section 8(b)(4)(B) conduct. The Board respectfully adheres to that position despite the First Circuit's rejection of it. However, since the enforcement measure which the instant contract purports to sanction is clearly violative of Section 8(b)(4)(B), this Court need not reach the broader position taken by the Board in *Carvel.* The *Muskegon* case itself is currently pending on petition for enforcement in the Sixth Circuit.

undertakes not to do business with a non-union employer subjects the contractor to nothing more than a lawsuit or an arbitration proceeding should he allegedly breach the agreement. On the other hand, where, as here, the contractor agrees that the union may terminate this and all other agreements it has with him, the contractor is subject to economic pressure proscribed by Section 8(b)(4), as well as a lawsuit, in the event of an alleged breach. As discussed *supra,* pp. 10–11, he is faced with a choice between ceasing to do business with the subcontractor or being "practically forced out of business" (Board Decision, R. 120). The termination provision here, in effect, acts as an enforcing mechanism, coercing the contractor to abide by his agreement not to deal with non-union subcontractors. In short, this kind of agreement creates a situation where the employer is subjected to pressure which is the type of secondary pressure which Congress sought to interdict in Section 8(b)(4).[27]

Here, as in *Sand Door* itself, the Board has rejected union tactics "not comporting with the legislative purpose to be drawn from the statute, projected into

[27] Compare *Sand Door* itself, where the Court distinguished between the employer's choice whether to refuse to deal with another which arises in a concrete situation—which choice the Court held should be uncoerced—and such a choice arising more or less in the abstract when the collective bargaining agreement is drawn up. See 357 U.S. at 105–106; see also, *Construction, Production & Maintenance Laborers Union, Local 383 etc.* v. *N.L.R.B.*, 323 F. 2d 422, 426, n. 2 (C.A. 9). In the instant case, the termination provisions act as a coercing mechanism at the time the choice in the concrete situation must be made.

the practical realities of labor relations" (357 U.S. at 105); on "such a matter the judgment of the Board must be given great weight, and we ought not to set against it our estimate of the relevant factors" (*id.*, at 107.)

The termination clause is clearly barred by Section 8(e) insofar as other industries are concerned. *N.L.R.B.* v. *Amalgamated Lithographers of America, (Ind.)*, 309 F. 2d 31, 39–42 (C.A. 9), cert. denied, 372 U.S. 943, See Lesnick, *Job Security and Secondary Boycotts,* 113 U. Pa L. Rev. 1000, 1013, n. 55 (1965). And the Board reasonably concluded that such a clause is not removed from the ban of that section by the limited construction industry proviso, since it is a means of secondary pressure which Section 8(b)(4) precludes respondents from exerting when a concrete situation arises.[28]

[28] Respondents erroneously contended before the Board that the instant case is inconsistent with the Board's decision in *Amalgamated Lithographers of America* (*Miami Post*), 130 NLRB 968, enforced as modified 301 F. 2d 20 (C.A. 5). That case involved a primary "struck work" clause together with an enforcing termination clause, whereas the instant case involves a secondary restrictive subcontracting clause with a termination clause. As the Board pointed out, "[t]here is no legislative history which shows a congressional intent to limit to lawsuits the enforcement of a clause outside the reach of Section 8(e) without reference to its proviso, as in the *Amalgamated Lithographers* case. But there is such an intention manifested as to contracts which would be unlawful under Section 8(e) but for the construction industry proviso" (R. 121). In short, *Lithographers* held no more than that self-help economic measures in support of a primary objective were not unlawful—a proposition not involved here.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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MARCH 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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National Labor Relations Board.

APPENDIX

References to exhibits pursuant to Court Rule 18(2)(f) (pages refer to the stenographic transcript).

No.	Identified	Received	Rejected
	GENERAL COUNSEL'S EXHIBITS		
1(a) through 1(dd)	5	5	
2	30	31	
3	54	55	
4	55	55	
5	56	56	
6	59	60	
7	60	60	
8	84	101	
9	84	101	
10	84	101	
11	85	101	
12	85	101	
13	85	101	
14	85	101	
15	85	101	
16	86	101	
17	86	101	
18	90		
	ETS-HOKIN'S EXHIBITS		
1	57	57	
2	114	115	
3	133	136	
4	331	332	
5	333	333	

No.	Identified	Received	Rejected
	IBEW'S EXHIBITS		
1	280	281	
2	295	296	
3	297	298	
4	298	301	
5	303	303	
6	320	321	
7	350	351	

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